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No. 88-1769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

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BRIEF IN OPPOSITION OF RESPONDENT VERMONT DEPARTMENT OF PUBLIC SERVICE

Of Counsel:
CLAYTON P. GILLETTE
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215

SAMUEL H. PRESS *
Vermont Department of
Public Service
120 State Street
Montpelier, Vermont 05602
(802) 828-2383

* Counsel of Record

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QUESTIONS PRESENTED

1. Should the Court deny certiorari under 28 U.S.C. § 1257(a) in a case where the petitioner did not properly present its constitutional issues to the state court?

2. Does refusal to allow reargument on a new issue, according to consistent Vermont practice, constitute adequate and independent state grounds which may not be reviewed under 28 U.S.C. § 1257(a)?

3. Has a litigant, which presented extensive materials and filings in a state action under the rules of civil procedure, been denied due process of law by the refusal of the highest state court to hear reargument on constitutional issues raised then for the first time?

4. Is a judicial decision, which holds in a case of first impression that a novel contractual arrangement is invalid under state law, a state action contrary to the Due Process Clause?

5. Does a judicial decision, which voids a public contract because it delegated authority contrary to state law, discriminate against interstate commerce because a nonresident is a party to the contract?

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BRIEF IN OPPOSITION OF RESPONDENT VERMONT DEPARTMENT OF PUBLIC SERVICE

Respondent, Vermont Department of Public Service ("VDPS"), respectfully requests that this Court deny the petition for a writ of certiorari dated May 1, 1989 submitted by Massachusetts Municipal Wholesale Electric Company ("MMWEC").

JURISDICTION

A writ of certiorari should not issue because the case does not meet the prerequisites for review of a state judgment under 28 U.S.C. § 1257(a). The pertinent part of section 1257(a) authorizes review if a "title, right, privilege, or immunity" has been "set up or claimed under the Constitution" by the petitioner in the state action. This case fails to meet the requirements for such review under the jurisprudence of the Court in two ways: 1) Pe-

titioner failed to properly raise its constitutional issues in the Vermont courts (see pages 9-14 below); and 2) the decision of the Vermont Supreme Court to deny reargument rests on adequate and independent state grounds (see pages 14-15 below).

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner MMWEC's lengthy Statement of the Case contains surprisingly little about the pertinent provisions of the contracts at issue here or the course of the litigation to this point. The result is a fragmentary (and at points inaccurate) version of the obligations to which the Vermont Supreme Court objected and an incomplete review of the procedural history that glosses over Petitioner's failure to raise its constitutional claims in a timely and proper manner (see pages 4-8 below).

A. The Power Sales Agreements

This case involves the validity of contracts, denominated Power Sales Agreements ("PSAs"), between MMWEC and six public-owned utilities created under Vermont law (the "Vermont Participants"). The question of the PSAs' validity was one of first impression before the Vermont Supreme Court; no Vermont court or regulatory body had previously considered arrangements even remotely similar to the PSAs, or construed the Vermont statutes at issue.[1]

In this initial test of the PSA's, the Vermont Supreme Court found two defects sufficiently substantial to require that the contracts be declared void ab initio: lack

[1] MMWEC wrongly implies that the PSAs were approved by the Vermont Public Service Board ("PSB") under its General Order No. 45. Petition at 9-10. This regulation required the Vermont Participants only to give notice of the PSAs, and has no provision for PSB approval. *In re Central Vt. Pub. Serv. Corp.*, 83 P.U.R. 4th 532, 542 n.13 (Vt. P.S.B. 1987). The PSB studied the involvement of only one of the six Vermont Participants.

of statutory authority (Petitioner's App. 6a to 11a, citing 30 V.S.A. sec. 4002) and impermissible redelegation of authority to MMWEC (Petitioner's App. 11a to 22a). The Vermont Supreme Court summarized the offending provisions of the PSAs as follows:

> Under the provisions of the PSAs, all decision-making power with regard to the project rests with MMWEC; the Vermont participants retain no voice in decisions to incur debt, to commence operation of the plant, or to decommission the plant. They have abdicated all management responsibility for and have obtained no ownership interest in the project. Petitioner's App. 11a.

MMWEC is a partial owner of the Seabrook nuclear power plant in New Hampshire. In 1979, MMWEC proposed to the Vermont Participants that they purchase "Project Capability" from MMWEC's share of Seabrook. "Project Capability" is basically the amount of electric capacity and energy, "if any," that Seabrook is capable of producing at any particular time. PSA § 1(q), App. 11a. Thus, the Vermont Participants were not simply purchasing electricity, but were gambling on a chance that electricity would be produced. In return, the Vermont Participants were obligated to pay MMWEC amounts that did not reflect the amount of electricity made available to them, but instead reflected the costs incurred by MMWEC in constructing and operating the project, regardless of the operating status of the project (or even its completion). This payment obligation was incorporated in the "take-or-pay, hell-or-highwater" provision of the PSAs, § 5(d):

> (d) The Participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project . . . is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project . . . . (App. 17a)

In short, the PSAs required the Vermont Participants to make payments in respect of MMWEC's costs for a plant not yet constructed and which might never be capable of producing electricity. Notwithstanding the nature of this risk, the PSAs denied the Vermont Participants any role in the planning, construction, financing, or operation of the project. MMWEC was empowered to make all decisions concerning issuance of bonds, decommissioning, termination, operation or expansion of the project without consulting the Vermont Participants.

The Vermont Supreme Court concluded that there is no basis in Vermont law for Vermont publicly-owned utilities to enter into these extraordinary provisions. Following similar decisions in other jurisdictions, the court determined that where the legislature had intended to allow Vermont municipalities to enter contracts so far afield from the ordinary purchase of capacity and energy, it had passed explicit authorizing legislation. The court further determined that the contractual abdication by the Vermont Participants over the fiscal and legislative affairs of their utility systems ran afoul of time-honored restraints on the conduct of municipal affairs. In particular, the court followed its own precedents in finding that a municipality that had been delegated authority to operate in the public trust could not redelegate that authority without explicit legislative permission. The court concluded that an arrangement that permitted MMWEC unilaterally to fix the amount of the Vermont Participants' payment obligations and to constrain Participants' exercise of their borrowing power constituted such an unlawful delegation.

B. Proceedings Below

A complete procedural history shows that VDPS repeatedly urged that the PSAs be voided. MMWEC, however, failed at every step—in pleadings, on summary

judgment, and on appeal—to present its constitutional arguments to defend against this remedy.

Pleadings: In the first thirteen of its fourteen counts, the VDPS complaint alleged that the PSAs were "void, invalid, ineffective and unenforceable." Petitioners App. 46a-55a. VDPS made claims based on common law, state statute, and the Vermont and Federal Constitutions. VDPS prayed that the Vermont Superior Court declare the PSAs "void, invalid, ineffective and unenforceable," and enjoin the Vermont Participants from making payments to MMWEC under the PSAs. (Petitioners App. 55a).

MMWEC had more than six months to consider its defenses before filing its answer. In the meantime, MMWEC availed itself of many of the protections provided under the Vermont Rules of Civil Procedure.[2] MMWEC twice moved to enlarge time to file a responsive pleading under Rule 6(b); and unsuccessfully moved to dismiss the complaint on a host of grounds under Rule 12(b). (Petitioner's App. 58a). The answer raised seven affirmative defenses under Vermont law in addition to the eighth through fourteenth defenses reprinted in Petitioners App. at 57a-58a. From the outset, MMWEC was represented by experienced Vermont and Boston counsel. Petitioners App. 27a, 58a, 63a-64a.

MMWEC did *not* plead that to void the PSAs would violate the Constitution; rather, MMWEC pleaded that commencement of the civil action by VDPS did so. Each of MMWEC's ninth through fourteenth defenses branded as unconstitutional the "conduct of the Vermont Depart-

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[2] The Vermont Rules of Civil Procedure, adopted in 1971, are very closely modeled on the Federal Rules of Civil Procedure. Even the numbering of the rules is parallel. "Federal cases interpreting the Federal Rules are an authoritative source for the interpretation of identical provisions of the Vermont Rules." Reporter's Notes to Vt. R. Civ. P. 1.

ment of Public Service, by prosecution of the present litigation and otherwise." Statements by MMWEC that it pleaded constitutional affirmative defenses to invalidation of the PSAs are simply not true. Questions Presented ¶ 2, Petition at i; Statement of the Case, Petition at 11.

Summary Judgment: MMWEC did not pursue any constitutional defenses after filing its answer. VDPS and MMWEC exchanged extensive filings on their cross-motions for summary judgment, including pre-filed testimony, proposed and agreed statements of fact, pre-trial briefs, memoranda, and reply memoranda. MMWEC filed a 45 page "Defendants Joint Pre-Trial Brief", May 30, 1986; a 55 page "Defendants' Joint Brief on Cross-Motions for Summary Judgment", September 22, 1986 (Printed Case at 267-324); and "Defendants' Joint Reply Memorandum on Cross-Motions for Summary Judgment" (October 1, 1986) (Printed Case at 413-430). In none of these did MMWEC present evidence or argument on any constitutional affirmative defenses. Indeed, MMWEC did not even so much as mention them. Accordingly, the Superior Court had no occasion to discuss or decide any affirmative defense, including those MMWEC raises here.[3]

Appeal: VDPS sought reversal on the grounds that the PSAs are void. Brief of Appellant, January 30, 1987, at 2, 20, 82, 112. MMWEC's brief to the Vermont Supreme Court, however, is completely silent on affirmative defenses to voiding the PSAs. MMWEC's 67 page brief below is devoid of argument, and indeed all mention, of its constitutional defenses. The lengthy "Table of Au-

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[3] In contrast, VDPS and MMWEC actively briefed VDPS constitutional causes of action to void the PSAs. See VDPS filings dated 11/26/85 at 36-45; and 9/22/86 (Printed Case at 237-245); MMWEC filings dated 1/28/86 at 27-29; and 9/22/86 (Printed Case at 322). In its Opinion and Order granting summary judgment in favor of MMWEC against VDPS, the Superior Court decided the constitutional claims presented by VDPS. Petitioners App. 82a-84a.

thorities Cited" in MMWEC's brief does not contain a single citation to the Federal Constitution, or to any case cited to the Court in the Petition. Joint Brief of the Defendants-Appellees, March 1987, at ii-viii.

Although silent on affirmative defenses of its own, MMWEC's brief below referred to the state law affirmative defenses of its co-defendants. These statements are all that MMWEC briefed about affirmative defenses. In describing the Superior Court proceedings, MMWEC apprised the Vermont Supreme Court that "the defendant villages and WEC [Washington Electric Cooperative] . . . also asserted a number of affirmative defenses to DPS's claims, including *inter alia*, waiver, estoppel, and res judicata, none of which was decided below." *Id.* at 3. At no point did MMWEC refer the Vermont Supreme Court to any purported constitutional defense. In its "Statement of Issues," MMWEC did touch on the disposition of claims and defenses not decided by the Superior Court:

> A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18] Certain issues that have been briefed by the DPS were not reached by the trial court and need not be reached by this Court if it affirms the judgment below.[19] If this Court does not affirm the judgment, the case should be remanded for determination by the trial-court of the issues not previously addressed.

MMWEC's footnotes 18 and 19 state in their entirety:

> [18] These include various state and federal constitutional claims as well as the contention that the PSA's conflict with 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates.
>
> [19] These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC. *Id.* at 20-21.

The Vermont Supreme Court noted MMWEC's attempt to reserve nonconstitutional affirmative defenses for remand, but declined to order consideration on further proceedings. Petitioners App. 23a. "Our holding that the PSAs are ultra vires and void ab initio obviates any such necessity." *Id.* The Vermont Supreme Court had no occasion to consider or decide any constitutional argument or affirmative defense by MMWEC.

The Vermont Supreme Court reversed the Superior Court and entered judgment for the plaintiffs on the grounds that the PSAs were void ab initio under Vermont law. Petition App. 3a, 24a. Only then, in a "Motion for Reargument" under V.R.A.P. 40, did MMWEC for the first time argue that voiding the PSAs would violate the Constitution. Petition App. 25a Paragraph 8 of MMWEC's motion for reargument makes a bare assertion of violation of the Commerce, Takings, and Due Process clauses. Petition App. 27a. MMWEC's grounds for the assertions appear in its memorandum in support of reargument. App. 38a-39a. The Vermont Supreme Court denied reargument on the ground that MMWEC failed "to identify points of law or fact previously overlooked or misapprehended." Petitioners App. 28a. This reason follows the requirement in V.R.A.P. 40 that a motion for reargument state "the points of law or fact, presented in the briefs upon the original argument, which . . . the Court has overlooked or misapprehended."

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petitioner Did Not Properly Present Its Constitutional Issues to the Vermont Courts

Review under 28 U.S.C. § 1257(a) requires that the petitioner have timely and adequately presented its issues to the lower court. *Clark v. Jeter*, —— U.S. ——, 108 S.Ct. 1910, 1913 (1988). The Court has declared its "practice, when reviewing decisions by state courts, not to decide federal claims that were not presented or passed upon below." *Id.*; *quoting Bankers Life & Casualty Co. v. Crenshaw*, —— U.S. ——, 108 S.Ct. 1645, 1651 (1988).[4] When, as is the case here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (citations omitted). To make this showing, "[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981), *followed in Bankers Life v. Crenshaw*, 108 S.Ct. at 1650.

The record below reveals an abdication by MMWEC of its responsibility to raise and press its arguments under the federal constitution. It is not surprising that both

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[4] Many of the Court's decisions hold that Section 1257 does not confer jurisdiction to hear such cases. *E.g.*, *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) (citing cases). Even if the Court "were not jurisdictionally barred from considering claims not pressed or passed upon in the state court . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

the Superior Court and the Supreme Court did not mention, let alone pass upon these issues, for at every stage of the case—from pleading, through summary judgment, and on appeal—MMWEC did not properly bring its arguments as reasonably required under Vermont law.

Pleading: MMWEC set forth no affirmative defense that the judicial voiding of the PSAs would violate the Constitution. Its ninth through fourteenth defenses asserted a wholly different matter, that the actions of VDPS *as plaintiff* violated the Constitution. This bizarre assertion, at best, would sound as a counterclaim. It hardly served to apprise the Vermont trial court of the nature and substance of constitutional argument with the "fair precision" required. *Street v. New York*, 394 U.S. 576, 584 (1969). To raise a federal question adequately, both the act complained of, and the constitutional doctrine said to be involved, should be identified with reasonable particularity. *See Clark v. Jeter*, 108 S.Ct. at 1913-14; *Taylor v. Illinois*, 484 U.S. ——, 108 S.Ct. 646, 651 n.9 (1988).

Vermont procedure requires that an affirmative defense be pleaded, or it is waived. Under Vt. R. Civ. P. 8(c), which is almost identical to the parallel federal rule, "unless an affirmative defense is specifically raised in the pleadings, it is not generally available at trial or appeal." *Brouha v. Postman*, 145 Vt. 449, 452, 491 A.2d 1038 (1985). Vermont practice is the same as under Fed. R. Civ. P. 8(c). *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278 and n.29 (1969 & Supp. 1987) (gathering cases).

Summary Judgment: MMWEC presented no supporting material or argument whatsoever on its affirmative defenses to the Superior Court. Therefore, without regard to the adequacy of its pleading, MMWEC abandoned the defenses under Vermont law by failing to introduce evidence, and to bring them to the attention of the trial

court. *Prescott v. Smits*, 146 Vt. 430, 433, 505 A.2d 1211 (1986).

Here too Vermont follows federal practice. "The defenses initially raised but not thereafter briefed or argued are, of course, deemed to have been abandoned." *A & H Manufacturing Co. v. Contempo Card Co.*, 576 F.Supp. 894, 896 n.1 (D.R.I. 1983). Such affirmative defenses are not open on appeal. *Golden Oil Co. v. Exxon Co.*, 543 F.2d 548, 551 (5th Cir. 1976); *Hilton v. Mumaw*, 522 F.2d 588, 595 (9th Cir. 1975). Even the claimed violation of a constitutional right is deemed abandoned if it is not pursued after pleading. *Oklahoma v. F.E.R.C.*, 494 F.Supp. 636, 651, n.13 (W.D. Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Yapalater v. Bates*, 494 F.Supp. 1349, 1369 n.15 (S.D.N.Y. 1980), *aff'd mem.*, 644 F.2d 131 (2d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

MMWEC seeks to excuse the abandonment of its constitutional defenses by implying that the parties agreed to forego constitutional claims in order to focus on state law issues. MMWEC suggests that the parties voluntarily confined themselves to state law issues in the Superior Court. Petition at 11. In reality, VDPS repeatedly raised and briefed its constitutional claims to the Superior Court, and MMWEC responded to them. (Supp. Statement of the Case at 6 n.8 above). Any implication that the parties agreed to restrict the range of issues is wrong. MMWEC then states that, because the range of issues was restricted, the Vermont "courts did not address the federal law claims asserted in the pleadings." Petition at 12. To the contrary, the Superior Court ruled on VDPS constitutional claims. Petitioners App. 82a-84a. The Vermont Supreme Court discussed no constitutional issues simply because the parties did not brief them on appeal.

Appeal: Even if MMWEC had not waived and abandoned its constitutional issues in the Superior Court, it did so by its total failure to raise, brief, or even mention them on appeal. Vermont rules reasonably require that an appellate brief state concise and specific issues. V.R.A.P. 28. In two recent opinions, the Vermont Supreme Court has alerted counsel that the burden to raise, develop, and maintain a constitutional argument lies with the proponent, and the court will not consider a constitutional issue not presented in "a clear and concise manner." *State v. Jewett*, 146 Vt. 221, 229, 500 A.2d 233 (1985) (state constitution); *State v. Taylor*, 145 Vt. 437, 439, 491 A.2d 1034 (1985).

If MMWEC thought it had no opportunity to develop its constitutional defenses before the Superior Court, it could and should have brought them to the attention of the Vermont Supreme Court. MMWEC could have raised them to support the judgment in its favor, or to urge remand to consider them. MMWEC instead waived them by its silence. *Swanton Village v. Town of Highgate*, 128 Vt. 402, 403, 264 A.2d 804 (1970). MMWEC itself recognized this rule in brushing aside VDPS' constitutional claims. It assured the Vermont Supreme Court that "issues raised below by the DPS . . . have not been briefed and therefore must be deemed waived." (Joint Brief of the Defendants-Appellees at 20) (quoted above at 7).

MMWEC instead mentioned in passing the nonconstitutional affirmative defenses of its co-defendants. (Supp. Statement of the Case at 7 above). By its reference to some but not all affirmative defenses, MMWEC directed the Vermont Supreme Court away from the issues it raises now. The Vermont Supreme Court duly addressed those affirmative defenses despite MMWEC's passing reference to them. That the court took up the arguments it saw establishes that MMWEC's constitutional defenses

were passed over precisely because MMWEC did not present them to the Vermont court.

Motion for Reargument: The motion for reargument did not timely or adequately raise the issues in the Petition that voiding the PSAs would violate the Constitution. The Court's long-established rule is dispositive: "Questions first presented to the highest State Court on a petition for rehearing come too late for consideration here. . . ." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). This rule has recently been followed to deny relief under very similar procedural circumstances. *See Prudential Federal Savings & Loan Association v. Flanigan*, 478 U.S. 1311 (Rehnquist, Circuit Justice 1986) (constitutional issues not presented to state court until petition for rehearing, which was denied without comment). The decision below granted the relief sought (voiding the PSAs), on the plaintiffs' state law theories, in a case of first impression. MMWEC does not and cannot contend that it was unfairly surprised by relief that could not have been anticipated, or by a sudden reversal of controlling precedent. Under these circumstances, MMWEC could not raise constitutional issues for the first time on motion for reargument. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980); *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in denial of certiorari).

Even if timely, MMWEC's motion for reargument did not adequately raise the issues it asserts here. The Petition gives one ground for certiorari: that MMWEC's procedural due process rights were violated by denying the opportunity "to assert and prove substantial federal constitutional affirmative defenses." Petition at i. *MMWEC did not raise this issue in seeking reargument.* Its memorandum in support of reargument mentions purported violations of the Takings and Commerce Clauses, but nowhere argues that its procedural due process rights were

violated. MMWEC cites the Due Process Clause, but only to explain that the "Takings Clause is made applicable to the states through the Due Process Clause." App. 39a. An unelaborated citation cannot be sufficient to apprise the state courts of the nature and substance of any one of the many doctrines under the Due Process Clause. The Court properly requires more, especially of a sophisticated litigant like MMWEC represented by counsel at all stages. *Cf. Taylor v. Illinois*, 108 S.Ct. at 651 n.9 ("generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights"); *Rotary International*, 481 U.S. at 550 n.9 (a "casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court").

II. The Decision Below Rests On Adequate and Independent State Grounds

The decision by the Vermont Supreme Court to deny MMWEC's motion for reargument rests on an adequate and independent state ground, so that the Court has no jurisdiction under 28 U.S.C. § 1257(a) to review the decision. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). The decision rests on MMWEC's failure "to identify points of law or fact previously overlooked or misapprehended." Petition App. 28a. As is evident from the discussion above at 6-7, MMWEC did not present its constitutional issues to the Vermont Supreme Court in its brief on appeal. The ground for decision is exactly MMWEC's failure to satisfy the prerequisites for reargument under V.R.A.P. 40. That rule provides in part:

> The motion shall state with particularity the points of law or fact, *presented in the briefs upon the original argument*, which in the opinion of the moving party the Court has overlooked or misapprehended and which would probably affect the result. (emphasis added)

Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground, provided that the state rule is consistently followed. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). The Vermont court has steadfastly denied reargument, both before and since the adoption of V.R.A.P. 40 in 1971, to address issues not presented in the briefs on the original argument. "Rehearing is not available to afford a new opportunity to present questions that were not presented in the tribunal from which the appeal was taken and were not briefed nor argued on review." *Town of Fairlee v. Boston & Maine Corp.*, 127 Vt. 215, 219, 244 A.2d 53 (1968) (Holden, C.J.). *See e.g., State v. Percy*, 149 Vt. 623, 642, 548 A.2d 408 (1988); *Black River Associates, Inc. v. Koehler*, 126 Vt. 394, 404, 233 A.2d 175 (1967); *In re Moxley's Will*, 103 Vt. 100, 115-116, 152 A. 713 (1931).

Vermont denies reargument to any party seeking to raise a new issue, whether sought by the appellant or the appellee, like MMWEC. "A rehearing is not granted for the purpose of affording opportunity to present new questions. And where there was occasion and opportunity for raising the point at the hearing, the rule applies equally to one not the excepting party." *Ryan v. Orient Insurance Co.*, 96 Vt. 291, 305, 119 A. 422 (1923) (citations omitted). Recent instances of reargument denied to an unsuccessful appellee seeking to raise new issues are *State v. Percy*, 149 Vt. at 642; *Bourne v. Jajoie*, 149 Vt. 45, 53, 540 A.2d 359 (1973); and *Corey v. Furgat Tractor & Equipment, Inc.*, 147 Vt. 477, 480, 520 A.2d 600 (1986). The rule applies as well to bar reargument to raise a constitutional affirmative defense to the judgment for the first time. *Coolidge v. Coolidge*, 130 Vt. 132, 135, 287 A.2d 566 (1972) (impairment of contracts); *Van Dyke v. Cole*, 81 Vt. 399, 70 A. 1103 (1908) (same).

III. MMWEC Enjoyed Full and Fair Opportunity to Litigate Its Constitutional Defenses Below in Accordance with Hight Standards of Procedural Due Process

Due process in a civil action requires that a party have fair notice of the issues and a reasonable opportunity to litigate them. *See generally Boddie v. Connecticut*, 401 U.S. 371 (1971). The procedural history (above at 5-7) shows that MMWEC had plain notice that the validity of the PSAs was at stake, and that MMWEC had ample opportunity at trial and on appeal to raise and press its constitutional defenses. Yet MMWEC did not present these issues for decision by the Vermont courts. Rather, MMWEC failed to set up these affirmative defenses in its pleadings; did not pursue them at trial; and did not even mention them on appeal until seeking reargument. MMWEC's plaint that it was denied procedural due process wrongly blames the Vermont courts for its own abject failure to litigate its defenses below.

Indeed, the procedural record is a testament to the high standard of procedural due process afforded MMWEC. MMWEC complains of no aspect of Vermont's civil proceeding which prevented it from litigating its constitutional defenses. There is no suggestion or inference that Vermont procedure—almost identical to the Federal rules approved by this Court—contains arcane rules, traps for unwary counsel, or arbitrary restrictions which unfairly restricted MMWEC's case. MMWEC was represented by three law firms to protect its interests at all stages of the action. MMWEC mentions no instance when it was allowed less than ample time, hearings, and filings to present evidence and argument.[5]

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[5] MMWEC's brief assured the Vermont Supreme Court: "The cross-motions for summary judgment were heard and determined on a record consisting of an extensive stipulation of facts, together with five volumes of exhibits, and prefiled testimony and oral cross-examination of the parties' experts." *Id.* at 3-4 (footnote omitted).

The Petition cites, with no discussion, decisions in which state procedure operated to cut off reasonable attempts to raise a federal issue. Petition at 13. These cases are fairly characterized as instances of trumped up, extreme, and often racially motivated procedural rulings, where the Court properly reached out to review plain error in order to prevent fundamental unfairness. None of them stand for the proposition that due process is denied a litigant like MMWEC which didn't bother to raise and press its claims in a readily available forum.

IV. The Petitioner's Federal Constitutional Claims Lack Substantive Merit and Require No Further Adjudication in the State Court System

A. *Judicial Invalidation of a Contract in a Case of First Impression Does Not Constitute a Deprivation of Property or Otherwise Implicate the Due Process Clause*

Petitioner's substantive arguments lack sufficient merit to require further adjudication in the state courts. Petitioner's first claim is that, even though the Vermont Supreme Court had never before determined the validity of a hell-or-high water contract like the PSAs, MMWEC was deprived of property in violation of the Due Process Clause by a judicial declaration of invalidity. Oddly, Petitioner does not explain its claim in terms of due process, but by reference to Takings Clause and Contracts Clause jurisprudence. At the same time, Petitioner seeks to avoid the limitations this Court has placed on those clauses.

The holding of the Vermont Supreme Court rests on the well-established doctrine of non-delegation: a Vermont municipality or cooperative may not, without explicit legislative permission, redelegate all authority to make financial or legislative decisions. *See* 6A E. McQuillan, *Municipal Corporations* § 24.21 (3d ed. rev. 1988). The PSAs obligate Vermont entities to pay pro

rata costs to construct a generating plant, even if the plant is never finished or operating. The PSAs exclude them, however, from the planning, construction, or operation of the plant that might cause or avoid the risk that the project will be a "dry hole". The Vermont Supreme Court held that this was an impermissible delegation of authority.

By its holding, the Vermont court has done nothing more than require politically accountable officials of political subdivisions to exercise the discretion with which they have been entrusted. Any deviation from this principle requires an explicit legislative authorization. See Petition App. 12a, n.2; 18a, n.3. Petitioner nowhere contends that the Vermont Supreme Court's finding of improper delegation under the PSAs was erroneous. It is difficult to comprehend that the Due Process Clause prohibits judicial application of the non-delegation doctrine to invalidate a contract that conflicts with the doctrine.

The thrust of Petitioner's argument is that a judicial decision has impaired the value of the PSAs. One would imagine that if any relief existed under the Federal Constitution for abrogation of a contractual right, it would fall within the Contracts Clause. U.S. Const. art. I, § 10, cl. 1. But, as even the Petitioner acknowledges, the Contracts Clause is not violated by a judicial decision. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924); Petition at 20 n.5.[6] The Contracts Clause was intended to enjoin the legislature from abrogating established rights in order to favor particular interest groups. The primary focus of the Contracts clause has been "upon *legislation* that was designed to repudiate or adjust pre-existing

[6] Indeed, the Court rejected such a claim in *Tidal Oil* notwithstanding the allegation that the state court had announced a sudden change in state law from its previous declarations. The claim is all the weaker where, as here, the state judicial opinion addresses an issue of state law—the validity of "hell-or-high water" obligations—in the first instance.

debtor-creditor relationships that obligors were unable to satisfy." *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 503 (1987) (emphasis added). The Commerce Clause was never intended as a check on the judicial power to determine the validity of contracts, or the capacity of courts to interpret what rights exist for parties to contracts. Thus, even to the extent that Contracts Clause criteria have been "assimilated" into Due Process standards, *see* Petition at 15 n.3, those criteria are not applicable to judicial declarations of law.

Petitioner invokes the "takings" standard of "investment-backed expectations" to support its ostensible due process argument. It relies on cases decided under the Federal Takings Clause, U.S. Const., amend. V. Petition at 14.[7] This Court has never held that judicial interpretations of law are implicated in the Takings Clause, or that the judgment in a civil action creates a claim for compensation by those against whom law is construed.[8] Moreover, the mere fact that governmental action caused a loss of economic expectation is not in itself a basis for a takings claim; the claimant must first establish that it had settled rights and expectations. *See Duquesne Light Co. v. Barasch*, —— U.S. ——, 109 S. Ct. 609 (1989). Unlike traditional takings cases in which governmental action interferes with settled property rights, here we

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[7] Ironically, the primary cases on which Petitioner relies actually found *no* taking to exist. *See PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[8] Justice Stewart once intimated in a concurring opinion that a taking could occur by judicial interpretation of law to the extent that it "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 294, 296-97 (1967) (Stewart, J., concurring). Even if that concurrence became law, it has no applicability to a case of first impression, such as this one, and where the basis for decision (the non-delegation doctrine) had strong roots in judicial decisions of the state.

find only a judicial interpretation of law that determines the existence and scope of rights under a contract presented to the court in a case of first impression. The judicial act of determining what rights exist in the first place triggers no constitutional claim.

Even if the judicial interpretation of a contract implicates a "takings" analysis, MMWEC has no claim because it had no "reasonable" investment-backed expectations. Hell or high water arrangements were novel in Vermont and elsewhere. Courts have divided over their validity.[9] Many states have deemed them so unlike traditional utility financing arrangements that special enabling legislation was enacted. *See e.g.*, S.C. Code Ann. § 6-23-110 (Law Co-op. Supp. 1982); Me. Rev. Stat. Ann. Titl. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen. Stat. § 159B-12 (1982); Va. Code § 15.1-1611 (1981). Vermont had indicated the extraordinary nature of these obligations by enacting specific legislation, although it does not apply to the Vermont Participants. *See* 30 Vt. Stat. Ann. § 5013 (1986). Indeed, the authority of MMWEC itself to make such arrangements is conferred by its enabling legislation in Massachusetts. *See* Mass. Comp. Laws Ann., ch. 164 App., § 1-6(a) (1976). Others have brought test cases to confirm the validity of these arrangements. *See e.g.*, *Johnson v. Piedmont Municipal Power Agency*, 287 S.E.2d 476 (S.C. 1982); *Frank v. City of Cody*, 572 P.2d 1106

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[9] *See Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983); *Chemical Bank v. Washington Public Power Supply System*, 102 Wash.2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1065, 1075 (1985); *Frank v. City of Cody*, 572 P.2d 1106 (Wyo. 1977); *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984); *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983). While cases denying the validity of take-or-pay contracts were decided subsequent to execution of the PSAs, the fact that in other jurisdictions cases were brought to test their validity prior to execution of similar documents suggests a general unease in the public power community about the validity of such arrangements in the absence of specific enabling legislation.

(Wyo. 1977); *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. 1977).

MMWEC and its representatives—underwriters, bond counsel, and financial advisors—were sophisticated participants in the area of public power. Given the novelty of hell-or-high water arrangements in Vermont, it was forseeable that a reviewing court could find the PSAs invalid, and MMWEC cannot now claim any loss of reasonable expectation.[10]

B. *Invalidation of the PSAs Does Not Discriminate Against Interstate Commerce*

Petitioner does not cite a single case in which any court has deemed the judicial act of declaring law to fall within, much less violate, the Commerce Clause. None of the cases of protectionism cited by Petitioner involves judicial decisions at all, much less one interpreting a novel and controversial financing scheme that sought to curtail the authority of a state's localities. To the contrary, this Court's pronouncements on the scope of the Commerce Clause consistently refer to state *legislative* or *administrative* action. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (in-state firms provide a "powerful safeguard against legislative abuse" of out-of-state firms with similar interests).

Even if the Commerce Clause did implicate judicial decisions, no violation arises simply because the action happens to involve a party from another state. The Vermont Supreme Court imposed no burden on MMWEC that it does not apply with equal force to domestic entities which contract with political subdivisions. No contracting party may, without explicit legislative authorization, usurp local fiscal and legislative au-

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[10] Note that Petitioner does not claim that it received or relied on any assurances by the Vermont Participants of the validity of the hell-or-high water obligation.

thority. This limitation prevails whether the contracting party is the Attorney General of Vermont, *see Thompson v. Smith*, 119 Vt. 488, 501, 129 A.2d 638 (1957) (non-delegation doctrine is a "deep-rooted principle of law"); a privately-owned utility within the state; or a foreign corporation such as MMWEC. The non-delegation doctrine protects local residents by requiring that elected officials exercise the discretion entrusted to them, and guards the integrity of the democratic process by ensuring that important local decisions are made by those politically accountable. Application of the doctrine is unequivocally *not* the kind of protectionist act that suggests a state is favoring its own residents over those of another jurisdiction to gain economic advantage. Nothing in the Vermont Supreme Court's opinion, and nothing Petitioner points to in Vermont law, prohibits MMWEC from selling electric capacity and energy to Vermont localities on the exact same terms available to Vermont suppliers or otherwise imposes on MMWEC burdens not applied to in-state corporations.

There would be no claim here even if the judicial decision of the Vermont Supreme Court were the sort of state action that affected interstate commerce. The Commerce Clause does not bar all conduct that affects interstate commerce. Rather, "(w)here [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 374, 393-94 (1983), *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[11] Vermont has a compelling interest to maintain accountability between the officials of its

[11] Note that this Court's statement again refers to potential Commerce Clause violations that arise from policies embodied in "statute," not common law.

political subdivisions and their constituents. The related burden is minimal; those who would contract with Vermont localities but who fear that the need to respect the autonomy of those localities increases contractual risks may seek prices that compensate fairly for any risks they perceive. They may not, however, contractually usurp the authority of those localities. Since these principles apply "even handedly" to siutations wholly intrastate in character as well as those that incidentally affect interstate commerce, any incidental effect on interstate commerce is an acceptable burden. *See e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471-72.

The cases cited by Petitioner to demonstrate a Commerce Clause violation are simply inapposite. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), involved an attempt by New Hampshire to retain for itself the benefits of state resources to the exclusion of non-residents. The embargo on export of the state's resources stands in marked contrast to the instant case. Here, of course, Vermont is an importer of power, not an exporter. Thus it is difficult to discern the type of "exportation ban" that comprised the unconstitutional protectionist regulation in *New England Power*. *See* 455 U.S. at 339. Nothing in the Vermont Supreme Court opinion bars or disadvantages interstate trade in energy and capacity.

Middle South Energy, Inc. v. Arkansas Public Service Commission, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), provides no greater support for Petitioner. While that opinion does apply the Commerce Clause to the importation of electricity, it does so under circumstances with little analogue to the instant situation.[12] The Eighth Circuit found evidence in the record

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[12] The result in *Middle South* is better explained on preemption grounds. *See Mississippi Light & Power Co. v. Mississippi ex rel. Moore*, —— U.S. ——, 108 S. Ct. 2428 (1988). *Middle South* and *Mississippi Light* are parallel cases which involved the same whole-

that made the state public service commission's discriminatory purpose of economic protectionism "abundantly plain." *See* 772 F.2d at 416. The sole basis for the commission's rejection of the contracts involved in that case was to shift the economic impact of the transaction from Arkansas to out-of-state ratepayers. The record here is empty of any similar purpose. Indeed, the Vermont trial court *upheld* the PSAs, notwithstanding the financial burden they imposed on Vermont ratepayers. The Supreme Court of Vermont reversed on reasoning that disavowed any distinction between projects that return benefits to Vermont commensurate with burdens and those that do not. Petition App. 22a-23a.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Vermont should be denied.

Respectfully submitted,

Of Counsel:
CLAYTON P. GILLETTE
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215

SAMUEL H. PRESS *
Vermont Department of
Public Service
120 State Street
Montpelier, Vermont 05602
(802) 828-2383

* Counsel of Record

July 10, 1989

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sale electric purchase arrangements subject to the same FERC order. In *Mississippi Light*, the Court made clear that the state actions in question were invalid because they were preempted by the FERC order.

APPENDICES

APPENDIX A

[EXECUTIVE COPY]

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC COMPANY
(A Public Corporation)

PROJECT NO. 6

POWER SALES AGREEMENT

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MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

POWER SALES AGREEMENT

THIS AGREEMENT is executed by the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), a political subdivision of the Commonwealth of Massachusetts, and the city or town of the Commonwealth of Massachusetts, or other electric utility, which has executed this Agreement (the "Participant").

WHEREAS, MMWEC has heretofore been duly organized as a body politic and corporate and political subdivision of the Commonwealth of Massachusetts under the laws of said Commonwealth (Mass. Stats. 1975, Ch. 775) and is authorized, among other things, jointly or separately to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of, own, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within or without said Commonwealth, to sell electric power and energy and other products of electric power facilities to member and nonmember cities and towns having municipal electric departments established under Chapter one hundred and sixty-four of the General Laws or a special act and to other utilities, public and private, within or without said Commonwealth and, subject to the approval of the Department of Public Utilities of the Commonwealth, to borrow money by the issue of bonds for any of its corporate purposes; and

WHEREAS, the Participant owns, operates and maintains one or more plants for the manufacture or distribution of electricity;

WHEREAS, MMWEC proposes to obtain an ownership interest in electric power facilities (the "Project") described in Exhibit B, attached hereto; and

WHEREAS, MMWEC proposes to sell, and the Participant proposes to purchase, its Participant's Share (hereinafter defined) of Project Capability (hereinafter defined), all as hereinafter provided:

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. *Definitions.*

The singular of any term defined in this Agreement shall encompass the plural, and the plural the singular, unless the context indicates otherwise.

(a) "Annual Budget" means the budget adopted by MMWEC pursuant to Section 5(a) of this Agreement which itemizes the estimated Monthly Power Costs of the Project during a Contract Year, or, in the case of an amended Annual Budget, during the remainder of a Contract Year.

(b) "Billing Statement" means the written statement prepared monthly by MMWEC and delivered to the Participant which shows the amounts to be paid for such month to MMWEC by the Participant as the Participant's Share of the Monthly Power Costs as set forth in an Annual Budget or an amended Annual Budget.

(c) "Bonds" means any bonds, notes or other evidences of indebtedness issued from time to time pursuant to and under authority of the Bond Resolution, (i) to pay the Costs of Acquisition and Construction of the Project, and (ii) for the purposes authorized by Section 14 of this Agreement.

(d) "Bond Resolution" means the General Bond Resolution of MMWEC, adopted August 26, 1976, as from time to time amended or supplemented by Supplemental Resolutions.

(e) "Contract Year" means the 12-month period commencing 2400 hours Local Time on June 30 of each year

during the term of this Agreement and ending 2400 hours Local Time on the June 30 next following, *provided*, that the first Contract Year shall commence at 2400 hours Local Time on the date immediately preceding (i) the earliest of the Dates of Commercial Operation of the Facilities, or (ii) the date to which interest is capitalized on all of the Bonds issued to finance the Costs of Acquisition and Construction of the Project but not later than one year prior to the first principal installment date for such Bonds, or (iii) the date one year after the date of termination of any of the Facilities as provided in Section 10, whichever is earliest, and the last Contract Year shall end at 2400 hours Local Time on the date of termination of this Agreement as provided in Section 2 of this Agreement.

(f) "Costs of Acquisition and Construction" shall mean, to the extent not included in Monthly Power Costs, all costs of determining the feasibility of and acquiring, constructing, financing, carrying out and placing in operation the Project, heretofore or hereafter paid or incurred by MMWEC, and shall include, but shall not be limited to, funds required for:

(1) working capital and reserves in such amounts as may be deemed necessary by MMWEC;

(2) interest accruing in whole or in part on Bonds prior to and during acquisition and construction and for such additional period as MMWEC may reasonably determine;

(3) acquisition of fuel including land, rights, leases and options therefor and working capital, equipment, structures, facilities or prepayments and reserves therefor;

(4) the deposit or deposits from the proceeds of Bonds in any fund or account established pursuant to the Bond Resolution to meet reserve requirements for Bonds;

(5) the deposit or deposits from the proceeds of Bonds in any funds or accounts established pursuant to the Bond Resolution as reserves for renewals, replacements and contingencies, and for decommissioning or termination;

(6) all federal, state and local taxes and payments in lieu of taxes legally required to be paid in connection with the acquisition and construction of the Project;

(7) all costs relating to injury and damage claims arising out of the acquisition and construction of the Project;

(8) the payment of the principal of and premium, if any, and interest on notes or other evidences of indebtedness issued in anticipation of the issuance of Bonds for the payment of the Costs of Acquisition and Construction of the Project;

(9) preliminary survey, investigation and development costs, engineering, contractors' fees, permits, licenses and approvals, labor, materials, equipment, lands, rights of way, franchises, easements and other interests in land, utility services and supplies, payments to other public agencies, training and testing costs, insurance premiums, fees and expenses of trustees and paying agents, legal and financing costs, administrative and general costs, and all other costs incurred by MMWEC and properly allocable to the acquisition and construction of the Project and carrying out and placing the same in operation; and

(10) All costs relating to the study and development of Electric Power Facilities listed in paragraph 2 of Exhibit B; *provided*, that (i) an aggregate amount not in excess of the amount listed in Exhibit B derived from the proceeds of Bonds issued to finance the Costs of Acquisition and Construction of

the Project may be expended for such costs, (ii) any such amount expended for such Electric Power Facilities for which bonds, notes or other evidences of indebtedness are issued pursuant to and under authority of the Bond Resolution shall be reimbursed to the Project from the first such bonds, notes or evidences of indebtedness issued, and (iii), subject to the preference rights of MMWEC members set forth in Article I. Section 5, of the By-Laws of MMWEC, the Participants shall have the first right to purchase all electric capacity and energy generated by any such Electric Power Facility, pro rata among those exercising such right, before such a disposition is made to an electric utility which is not a Participant. All Participants who are members of MMWEC hereby waive any preference right set forth in said By-Laws and not otherwise provided herein. Additionally, MMWEC will use its best efforts to obtain similar waivers of preference rights from its members who are not Participants or agreements with such members for the advancement of funds for the purposes listed in paragraph 2 of Exhibit B.

Any amounts received pursuant to clause (ii) of the preceding paragraph shall be applied to payment of Costs of Acquisition and Construction of the Project or, at the option of MMWEC, to payment of additional costs for the purposes listed in paragraph 2 of Exhibit B, if received prior to the date the construction fund for the Project to be established pursuant to the Bond Resolution is closed, or to the purchase or earliest possible redemption of Bonds issued for the Project, if received thereafter.

(g) "Date of Commercial Operation" and words of like import shall mean the date upon which a Facility is first ready for normal continuous operation as determined pursuant to an ownership agreement applicable thereto, in the case of any Facility jointly owned, if any,

and by MMWEC in the case of any Facility solely owned by MMWEC.

(h) "Electric Power Facility" shall mean any system or facilities for the generation, transmission or transformation of electric power and energy by any means whatsoever, including, without limiting the generality of the foregoing, facilities for processing refuse or other materials into fuel, with or without other by-products.

(i) "Facility" means any one of the Electric Power Facilities described in paragraph 1 of Exhibit B, attached hereto.

(j) "Monthly Power Costs" shall mean all of MMWEC's costs, to the extent not included in the Costs of Acquisition and Construction, resulting from the ownership, operation, maintenance and termination of, and necessary repairs, renewals, replacements and additions to, the Project, including but not limited to the following items of cost that are paid or incurred by MMWEC during each month of each Contract Year in connection with the Project:

(1) the amount (calculated without reference to acceleration for default under the Bond Resolution) which MMWEC is required under the Bond Resolution to pay or deposit during such month from the Revenue Fund into the Bond Fund established by the Bond Resolution for the credit of the Interest Account, Principal Account or Bond Retirement Account for the payment of the principal of and premium, if any, on the Bonds when due, and interest on principal until such principal is due:

(2) the amount equal to 10% of the amount in item (1) above (calculated before credit for investment earnings) which may be deposited in funds created under the Bond Resolution and be available under circumstances described therein for the Proj-

ect and other projects in which the Participants may not have an interest;

(3) the amount to be paid in such month under Section 13 hereof into the Study and Development Fund established by the Bond Resolution and the amount to be paid or set aside in such month with respect to the Project in a fuel fund, if any, established by the Bond Resolution;

(4) the amount which may be required by MMWEC during such month to pay the costs of (i) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project necessary to achieve design capability, or required by any governmental agency or authority, (ii) any renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project which in the opinion of the Consulting Engineer appointed and retained by MMWEC under the Bond Resolution are necessary or desirable to improve operating reliability or to reduce unit power costs, and any acquisition of fuel for the Project, (iii) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project for which MMWEC shall be responsible under any ownership agreement relating to the Project, and (iv) extraordinary operation and maintenance costs of, including extraordinary costs of fuel, and the cost of preventing or correcting any unusual loss or damage (including major repairs) to, the Project or any part thereof, all to the extent that MMWEC is not reimbursed for the payment of the costs set forth in clauses (i)-(iv) from the proceeds of insurance, or funds for such payment are not available to MMWEC therefor from any funds set aside with respect to the Project in the Reserve and Contingency Fund established under the Bond Resolution or funds for such payment are not provided or to be provided

by the issuance of Bonds pursuant to Section 14 of this Agreement;

(5) the payment of the principal of and premium, if any, and interest on notes or other evidences of indebtedness issued in anticipation of the issuance of Bonds for the payment of the Costs of Acquisition and Construction of the Project or for the purposes specified in Section 14 of this Agreement;

(6) the costs of producing and delivering power and energy from the Project during such month (including, but not limited to, fuel, ordinary operation, maintenance and repair costs and working capital and reserves deemed necessary therefor by MMWEC, administrative and general expenses, insurance and overhead) not included in the costs hereinbefore specified and properly chargeable to the Project;

(7) the retirement from service, decommissioning and termination of the Project; and

(8) At the option of MMWEC, in the event the Date of Commercial Operation of a Facility occurs prior to the date to which interest is capitalized on any Bonds issued to finance the Costs of Acquisition and Construction of the Project, an amount not to exceed the interest accruing from such Date of Commercial Operation to such date to which such interest is capitalized, and the Participant agrees pursuant to Section 5.4 of the Bond Resolution that, notwithstanding Section 5(h) of this Agreement, any such amount which is excess under said Section 5.4 shall be applied as soon as practicable to payment of Costs of Acquisition and Construction or, at the option of MMWEC, to the purchase or earliest possible redemption of Bonds issued for the Project.

(k) "New England Power Pool" means the power pool created by the New England Power Pool Agreement.

(l) "New England Power Pool Agreement" means a contractual agreement among electric utilities in New England which agreement constitutes the central dispatching and primary pooling arrangement for electric utilities in the New England states.

(m) "Participants" means those entities which are specified in Exhibit A, attached hereto, and which enter into a Power Sales Agreement.

(n) "Participant's Share" means the percentage of Project Capability set opposite the name of the Participant in Exhibit A, attached hereto, adjusted as provided in Sections 3 and 12 of this Agreement.

(o) "Power Sales Agreements" means this Agreement and all other agreements substantially identical to this Agreement entered into by MMWEC and the Participants with respect to the Project.

(p) "Project" means MMWEC's ownership interest in the Electric Power Facilities described in paragraph 1 of Exhibit B, attached hereto.

(q) "Project Capability" means the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses, and shall be determined in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice.

(r) "Prudent Utility Practice" at a particular time means any of the practices, methods and acts (including but not limited to the practices, methods and acts engaged in or approved by a significant portion of the electrical utility industry prior thereto) which, in the

exercise of reasonable judgment in the light of the facts known at the time the decision was made, would have been expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety and expedition. Prudent Utility Practice shall apply not only to functional parts of the Project but also to appropriate structures, landscaping, painting, signs, lighting, or facilities and public relations programs reasonably designed to promote public enjoyment, understanding and acceptance of the Project. Prudent Utility Practice is not intended to be limited to the optimum practice, method or act, to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts. In evaluating whether any matter conforms to Prudent Utility Practice, the parties shall take into account (i) the fact that MMWEC is a body politic and corporate and a political subdivision under the laws of the Commonwealth of Massachusetts, with the statutory duties and responsibilities thereof (ii) the objectives to integrate the Project Capability with the generating resources of the Participants, including such resources and electric capacity and energy purchased under contract, to achieve optimum utilization of the resources and achieve efficient and economical operation of each system, (iii) the New England Power Pool Agreement, if any, and (iv), in the case of any Facility jointly owned, the applicable ownership agreement between the owners of the Facility.

2. *Term of Agreement.*

This Agreement shall be effective upon execution and delivery of Power Sales Agreements by MMWEC and Participants whose Participants' Shares total 100.0%. This Agreement shall terminate when (i) all of the Facilities have been terminated as provided in Section 10 of this Agreement, (ii) the principal of and premium, if any, and interest on all of the Bonds have been paid or funds set aside for the payment or retirement thereof

in acordance with the Bond Resolution and (iii) all other obligations and liabilities hereunder have been paid or provided for.

3. *Financing, Design, Acquisition, Construction, Operation and Maintenance of the Project.*

(a) MMWEC, in good faith and in accordance with Prudent Utility Practice, shall, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners of the Facility, use its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; (ii) to obtain, or arrange for obtaining, permits and other rights and regulatory approvals necessary for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; and (iii) to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, and to finance the costs of any necessary renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project, not otherwise provided for, *provided*, that in each such case Bonds may then be legally issued and sold.

(b) In order to enable MMWEC to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, each Participant must satisfy the criteria established in subparagraphs (1), (2) and (3) of paragraph F of Section 2.3 of the Bond Resolution. MMWEC may from time to time request from the Participants such information or documents as MMWEC deems to be required to demonstrate the Participants' ability to satisfy such criteria and so as to enable Bonds to be issued on such issuance date as shall be specified by MMWEC concurrently with the request. MMWEC will provide assistance to the Participants in obtaining such information and documents. The Participants shall

deliver to MMWEC all such information and documents by no later than thirty days after the date of such request. If the Board of Directors of MMWEC finds with respect to a Participant either that all such information and documents were not delivered as aforesaid or that the same demonstrates that such Participant will, on or within a reasonable time after the specified issuance date, be unable to satisfy the criteria necessary under said subparagraphs (1), (2) and (3) so as to enable the Bonds to be issued on or within a reasonable time after such date, then in such event the Participant agrees that all of its interest herein (including its Participant's Share of Project Capability) may be assigned, transferred and sold by MMWEC on behalf of the Participant to one or more other electric utilities and upon any such disposition the Participant shall be relieved of all liability and shall have no further obligations hereunder, except as to accrued liabilities and obligations, anything in Section 21 of this Agreement to the contrary notwithstanding; *provided*, that (i) no such disposition shall be effective if the Bonds are not issued within four months of the specified issuance date, (ii) the other Participants shall have the first right to accept each such disposition, pro rata among those exercising such right, before such a disposition is made to an electric utility which is not a Participant and (iii) no such disposition shall be made if in the opinion of counsel to MMWEC the same would adversely affect the exemption from Federal income taxation of the interest on the Bonds. If a Participant accepts a disposition as aforesaid, its Participant's Share as so increased shall be its Participant's Share for all purposes of this Agreement, including but not limited to Section 12(d) of this Agreement. Any reference in this paragraph to subparagraphs (1), (2) and (3) of paragraph F of Section 2.3 of the Bond Resolution and to Bonds shall also be deemed to refer to any comparable provisions of any bond resolution or similar document pursuant to which MMWEC may issue bonds, notes or

other obligations to finance electric generation or transmission facilities.

(c) The Participant hereby approves MMWEC's estimate of the Costs of Acquisition and Construction of the Project, a copy of which estimate is on file with the Participant. MMWEC shall deliver revised estimates of the Costs of Acquisition and Construction of the Project to the Participant from time to time to reflect substantial changes in construction schedules, plans, specifications, or costs, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners of the Facility.

(d) MMWEC shall, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners of the Facility, operate and maintain the Project, or cause the Project to be operated and maintained, in accordance with Prudent Utility Practice and so as to meet the requirements of government agencies having jurisdiction.

4. *Sale and Purchase of Participant's Share.*

MMWEC hereby sells, and the Participant hereby purchases, its Participant's Share of Project Capability. The amounts to be paid for each Contract Year by the Participant to MMWEC for its Participant's share of Project Capability shall be its Participant's Share of the Monthly Power Costs for such Contract Year.

5. *Payments by the Participant; Sources of Such Payments.*

(a) At least 90 days prior to each Contract Year, MMWEC shall deliver to the Participant an Annual Budget for the Contract Year. During each Contract Year, MMWEC shall review at least quarterly its Annual Budget for the remainder of the Contract Year. In the event such or any other review indicates that such

Annual Budget will not substantially correspond with actual Monthly Power Costs, or if at any time during such Contract Year there are or are expected to be extraordinary receipts, credits or costs substantially affecting the Monthly Power Costs, MMWEC shall prepare and deliver to the Participant an amended Annual Budget applicable to the remainder of such Contract Year. The Annual Budgets shall, in the case of any jointly owned Facility, conform to the applicable ownership agreement between the owners of the Facility.

(b) On or before the 1st day of each month of each Contract Year, MMWEC shall prepare and deliver to the Participant a Billing Statement showing the amount payable by the Participant as the Participant's Share of the Monthly Power Costs, as shown in the Annual Budget for such Contract Year or in an amended Annual Budget for the remainder of such Contract Year. The amounts shown in the Billing Statement to be paid to MMWEC by the Participant shall be due and payable on the twentieth day of the month, and any amounts due and not paid by the Participant on or before the close of business on the 20th day of the month shall bear interest until paid at the rate of 1½% per month. Remittances received by mail will be accepted without assessment of said charges, provided that the postmark indicates that the payment was mailed on or before such day. If the 20th day of the month is a Sunday or other non-business day of the Participant, the next following business day shall be the last day on which payment may be mailed without addition of said charges.

Fuel charges shall be shown on the Billing Statement as a separate line item providing the necessary information with respect thereto is available to MMWEC.

(c) The Participant shall not be required to make any payments to MMWEC under this Agreement except from the revenues and other moneys derived by the Participant

from its electric department or system. The Participant covenants and agrees that it will fix, revise and collect fees or charges for electric power and energy and other services, facilities and commodities sold, furnished or supplied through its electric department or system at least sufficient to provide revenues adequate to meet its obligations under this Agreement and to pay any and all other amounts payable from or constituting a charge and lien upon such revenues, including amounts sufficient to pay the principal of and interest on all bonds issued by the Participant for electric purposes.

(d) The Participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project or any Facility thereof is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any Facility thereof for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance by MMWEC or any other Participant under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy.

(e) The Participant shall not have the right to challenge any bill, invoice or statement rendered by MMWEC, invoke arbitration of the same or bring any court or administrative action of any kind questioning the propriety of the same after a period of twenty-four months from the date of rendering. In the case of a bill, invoice or statement containing estimates, the Participant shall not have the right to challenge its accuracy after a period of twenty-four months from the date of its adjustment to reflect the actual amounts due.

(f) The Participant shall not issue bonds, notes or other evidences of indebtedness payable from and secured

by a lien on the revenues derived from the ownership or operation of its electric system without providing for the payment of operating expenses (including Monthly Power Costs hereunder) from such revenues ahead of debt service on such bonds, notes or other evidences of indebtedness unless an independent consulting engineer or engineering firm or corporation having a national and favorable reputation for special skill, knowledge and experience in analyzing the operations of electric utility systems certifies that the facilities, for the financing of which the bonds, notes or other evidences of indebtedness are being issued, are (or were when the Participant committed itself to them by contract or financing) reasonably expected to properly and advantageously contribute to the conduct of the business of the electric system of the Participant in an efficient and economical manner consistent with prudent management. This paragraph (f) shall not apply to bonds, notes or other evidence of indebtedness issued to meet obligations under joint ownership agreements to which the Participant is a party on the date hereof, or to refund bonds, notes or other evidences of indebtedness heretofore issued, or hereafter issued in compliance herewith, payable from and secured by a lien on revenues in priority to operating expenses.

(g) MMWEC shall apply, as a credit against Monthly Power Costs, all available receipts, revenues and other moneys received by it from insurance proceeds, the sale of surplus Project equipment, materials and supplies, interest earned on investments if and to the extent not credited against the Cost of Acquisition and Construction and any other moneys to be credited thereto under the Bond Resolution.

(h) On or before one hundred twenty days after the end of each Contract Year MMWEC shall submit to the Participant a statement of the actual aggregate Monthly Power Costs for such Contract Year. If the Participant's Share of such actual aggregate Monthly Power Costs and

any other amounts payable for such Contract Year exceed the amounts on the basis of which the Participant has been billed, the deficiency shall be added to the next succeeding Billing Statement or at MMWEC's discretion spread over the remainder of the then current Contract Year. If the actual aggregate Monthly Power Costs or other amounts payable for such Contract Year are less than the amounts on the basis of which the Participant has been billed, MMWEC shall credit such balance on the next succeeding Billing Statement, or by agreement of the Participant and MMWEC on the Billing Statements delivered to the Participant for the remainder of the then current Contract Year.

(i) In the event of the application of amounts allocated to the Project in the Reserve and Contingency Fund under the Bond Resolution to the payment of costs allocable to other projects, amounts thereafter paid on account of such other projects for deposit in the Reserve and Contingency Fund shall be credited pro rata on the next succeeding Billing Statements delivered to the Participants to the extent necessary to reimburse the Participants (without interest) from surplus moneys under the Bond Resolution for any credit lost by the Participants as a result of such event. If any credit under this Agreement exceeds the amount due from the Participant in any month, the excess shall be paid to the Participant. In the event of the application of moneys allocable to other projects in the Reserve and Contingency Fund to costs allocable to the Project, the Participants shall continue to make payments for deposit in the Reserve and Contingency Fund without reduction on account of any termination or reduction of debt service or otherwise until the participants in such other projects have been similarly reimbursed. To the extent practicable, MMWEC shall include a similar requirement in other power sales agreements for the benefit of the Participants. Subject to the Bond Resolution, MMWEC shall generally exercise

its powers, insofar as practicable, so as to restore to the Participant any credit or other benefit lost as the result of any default by any other person or as the result of the use of moneys attributable to the Project under the Bond Resolution for the purposes of other projects.

6. *Accounting.*

MMWEC shall keep accurate records and accounts for the Project substantially in accordance with the rules and regulations of the Department of Public Utilities of the Commonwealth, separate and distinct from its other records and accounts. Such records and accounts shall contain information supporting the allocation of MMWEC's indirect costs associated with the Project. Such records and accounts shall be audited annually by a firm of certified public accountants, experienced in electric utility accounting and of national reputation, to be employed by MMWEC. Such records and accounts and such annual certified audit, including all written comments and recommendations of such accountants, shall be made available for inspection by the Participant at any reasonable time.

The Participant shall, at the time of the filing of the return required by law and the rules and regulations of the Department of Public Utilities of the Commonwealth, of any similar regulatory agency of any other State or of any other appropriate regulatory agency, file a copy of such return with MMWEC.

The Participant shall, in each fiscal year, file with MMWEC financial statements for the first six months and for the entire twelve months of such year. Such statements shall be so filed within sixty days after the close of the applicable period or, in the case of the twelve-month statements, within any longer period permitted for the filing thereof with the Department of Public Utilities

of the Commonwealth or similar regulatory agency of any other State.

The Participant shall provide to MMWEC such other certificates, statements and information as MMWEC shall reasonably require, including those required in connection with its financings.

7. *Dispatch; Metering; Deliveries; Transmission.*

The Project shall be dispatched in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice. If the Participant is not a member of the New England Power Pool, it shall arrange with the New England Power Pool, or other electric utilities, for dispatch services related to the Participant's Share of Project Capability. If and to the extent that outage information is not available to the Participant from the New England Power Pool, MMWEC shall promptly notify the Participant of the outage.

Electric power and energy to be furnished hereunder shall be alternating current, three phase, sixty hertz. The point(s) of delivery, point(s) of measurement, metering ownership and special conditions of service shall be as set forth in Exhibit C hereto attached. Exhibit C may be amended from time to time to include such other point or points of delivery and measurement and any other provisions pertaining to conditions of service as may be agreed upon by MMWEC and the Participant. To the extent metering information is not directly available to the Participant, MMWEC shall furnish such metering information as may be reasonably requested by the Participant to the extent such information is available to MMWEC.

The Participant shall be responsible and arrange for the transmission of capacity and energy sold under this agreement between the Electric Power Facility and its system, including the installation and maintenance of

facilities required for it to receive such electric capacity and energy into its system. MMWEC may, at its option, elect to deliver the capacity and energy from the Project or a portion thereof to a delivery point on the Participant's system. In any event, the Participant shall be responsible for all transmission and transformation losses and costs incurred with respect to the Participant's Share of Project Capability between the Project and its system.

8. *Insurance.*

MMWEC shall maintain in force, for the benefit of the Project and the Participants as their respective interests shall appear, as a Project expense, such insurance as will satisfy the requirements of the Bond Resolution and applicable statutes and regulations thereunder, and such other insurance as MMWEC may deem desirable. Subject to Section 10 of this Agreement and the provisions of the Bond Resolution, any proceeds of such insurance received by MMWEC for loss or damage to the Project shall be used to repair the Project.

9. *Training.*

MMWEC shall carry out a familiarization and training program to maintain adequate staff for the Project and the expenses thereof shall be part of the direct or indirect Costs of Acquisition and Construction or Monthly Power Costs as appropriate.

10. *End of the Project; Termination Settlement.*

As to any Facility solely owned by MMWEC, MMWEC shall comply with the provisions of subparagraphs (i), (ii) and (iii), and as to any Facility jointly owned by MMWEC, subject to the agreement between the owners of such Facility, MMWEC shall comply with the provisions of subparagraphs (i), (ii) and (iii) in substantially the same manner as if the Facility were wholly owned by MMWEC.

(i) A Facility shall be terminated and MMWEC shall cause it to be salvaged, discontinued, decommissioned, and disposed of or sold in whole or in part in such manner as MMWEC may determine when:

(A) MMWEC determines that it is unable to construct, operate or proceed as owner of such Facility due to licensing, or operating conditions or other causes which are beyond its control.

(B) MMWEC determines that such Facility is not capable of producing energy consistent with Prudent Utility Practice.

The date of termination shall be the earlier of the dates of the termination under subparagraphs (A) and (B).

(ii) After such termination, MMWEC shall undertake the decommissioning of such Facility. MMWEC shall make monthly accounting statements to the Participant of all costs associated therewith. Such monthly accounting statements shall continue until such Facility has been salvaged, discontinued, decommissioned and finally disposed of hereunder, at which time a final accounting statement shall be made by MMWEC and such final accounting statement shall be made at the earliest reasonable time. The costs of decommissioning shall include, but shall not be limited to, all of MMWEC's accrued costs and liabilities resulting from MMWEC's ownership, construction, operation (including cost of fuel), maintenance of and renewals and replacements to such Facility and the costs of salvage, discontinuance and disposition or sale thereof.

(iii) The final accounting statement shall credit to the Participants, and deduct from any amount otherwise chargeable to them, the fair market value of any assets related to any Facility then retained

by MMWEC. If the final accounting statement shows that the costs referred to in subparagraph (ii) above exceed such credits after application by MMWEC of all other funds available for such purpose, the Participant shall pay MMWEC a sum determined by multiplying the amount shown to be due in MMWEC's final accounting statement by the Participant's Share. If the final accounting statement shows a balance of credits to the Participants, MMWEC shall pay the same to the Participants.

11. *Sale of Excess Participant's Share.*

In the event that the Participant shall determine that all or any part of the Participant's Share of the Project Capability is in excess of the requirements of the Participant, the Participant shall notify MMWEC of such determination and MMWEC shall use its best efforts to sell and transfer for any period of time all or part of such excess. The other Participants shall have the first right to accept each such disposal pro rata among those exercising such right before a transfer is made to an electric utility which is not a Participant. If all or any portion of such excess of the Participant's Share of Project Capability is sold pursuant to this section, the Participant's Share shall not be reduced, and the Participant shall remain liable to MMWEC to pay the full amount of its Participant's Share of Monthly Power Costs as if such sale had not been made, except that such liability shall be discharged to the extent that MMWEC shall receive payment for such excess Project Capability from the purchaser or purchasers thereof.

12. *Obligations in the Event of Default.*

(a) Upon failure of the Participant to make any payment in full when due under this Agreement or to perform any obligation herein, MMWEC shall make demand upon the Participant, and if said failure is not cured

within 20 days from the date of such demand it shall constitute a default at the expiration of such period. Notice of such demand shall be provided to the other Participants by MMWEC.

(b) If the Participant in good faith disputes the legal validity of said demand, it shall make such payment or perform such obligation within said 20 day period under protest directed to MMWEC. Such protest shall specify the reasons upon which the protest is based.

(c) Upon the failure of any Participant to make any payment which failure constitutes a default under this Agreement, MMWEC shall use its best efforts to sell and transfer all or a portion of such Participant's Share for all or a portion of the remainder of the term of this Agreement. The other Participants shall have the first right to accept each such disposal pro rata among those exercising such right before a transfer is made to an electric utility which is not a Participant. If all or any portion of the Participant's Share is transferred pursuant to this paragraph, the Participant's Share shall not be reduced, and the Participant shall remain liable to MMWEC to pay the full amount of its Participant's Share of Monthly Power Costs as if such sale had not been made, except that such liability shall be discharged to the extent that MMWEC shall receive payment from the purchaser or purchasers thereof.

(d) Upon failure of any other Participant(s) to make any payment which failure constitutes a default under this Agreement, and except as transfers are made pursuant to paragraph (c), the Participant's Share shall be automatically increased for the remaining term of this Agreement pro rata with that of the other non-defaulting Participant(s) and the defaulting Participant's(s') Share(s) shall be reduced correspondingly; *provided*, that no such reduction shall reduce the defaulting Participant's(s') obligations under paragraph (e); and further *provided*, that the sum of such increases for the Partici-

pant pursuant to this paragraph shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share prior to any such increases.

(e) If the Participant shall fail or refuse to pay any amounts due to MMWEC hereunder, the fact that other Participants have assumed the obligation to make such payments shall not relieve the Participant of its liability for such payments, and any Participants assuming such obligation, either individually or as a member of a group, shall have a right of recovery from the Participant (diminished to the extent such Participants have received value from the concomitant rights and interests). MMWEC or any Participant as their interests may appear, jointly or severally, may commence such suits, actions or proceedings, at law or in equity, including suits for specific performance, as may be necessary or appropriate to enforce the obligations of this Agreement against the Participant.

13. *Development Work.*

The Billing Statement may also show, as an amount to be paid as part of the Monthly Power Costs in the month to which the Billing Statement applies, a sum to be used to pay the cost of work in connection with the development of Electric Power Facilities to serve the needs of cities and towns of the Commonwealth having municipal electric departments, including, but not limited to, planning, engineering, siting, environmental, financial and economic surveys, studies and work; the acquisition of options to acquire real estate; payments with respect to fuel; and any other costs and expenses incurred in connection with the planning, construction and acquisition of any Electric Power Facility or an ownership interest therein and the placing of the same in operation (herein referred to as "Development Work"). Such amount shall be shown in the Annual Budget and may not exceed 1% of the

Participant's Share of the amount described in subparagraph (1) of paragraph (j) of Section 1 hereof (calculated before credit for investment earnings). Such amounts when received by MMWEC shall be deposited in the Study and Development Fund established by the Bond Resolution and administered in accordance therewith.

14. *Issuance of Bonds for Renewals, Etc., and for Refunding.*

In addition to the issuance of Bonds to pay the Costs of Acquisition and Construction as provided in Section 3 of this Agreement, MMWEC may issue Bonds in accordance with the provisions of the Bond Resolution at any time and from time to time in the event funds are required to pay the costs of (i) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project necessary to achieve design capability, or required by any governmental agency or authority, (ii) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project which in the opinion of the Consulting Engineer appointed and retained by MMWEC under the Bond Resolution are necessary or desirable to improve operating reliability or to reduce until power costs, and any acquisition of fuel for the Project, and any decommissioning or termination of the Project, and (iii) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project for which MMWEC shall be responsible under any ownership agreement relating to any jointly owned Facility, all to the extent that MMWEC is not reimbursed for payment of the costs set forth in clauses (i) through (iii) from the proceeds of insurance. The Annual Budget delivered to the Participant for the Contract Year in which such Bonds are issued, or an amended Annual Budget for such Contract Year, shall also set forth the financing plan and budget of expenditures with respect to such Bonds and the proceeds thereof.

Bonds may also be issued to refund any Bonds in order to reduce the Monthly Power Costs or in the event, in the opinion of MMWEC, it may otherwise be advantageous.

15. *Modification and Uniformity of Agreements.*

(a) This Agreement shall not be subject to termination by any party under any circumstances, whether based upon the default of any other party under this Agreement, or any other instrument, or otherwise, except as specifically provided in this Agreement.

(b) This Agreement shall not be amended, modified, or otherwise changed by agreement of the parties in any manner that will materially and adversely affect the security afforded by the provisions of this Agreement for the payment of the principal of and premium, if any, and interest on any of the Bonds, and any other obgligations of MMWEC ranking pari passu therewith as to the security afforded by the provisions of this Agreement, as they respectively become payable, so long as any of the Bonds and such obligations are outstanding and unpaid or funds are not set aside for the payment or retirement thereof in accordance with the Bond Resolution.

(c) If any other Power Sales Agreement is amended or replaced so that it contains terms and conditions different from those contained in this Agreement. MMWEC shall notify the Participant and upon timely request by the Participant shall amend this Agreement to include similar terms and conditions.

16. *Notices.*

Any notice, demand, approval, proposal, protest, direction or request provided for in this Agreement to be delivered, given or made to the Participant shall be deemed delivered, given or made if delivered in writing

in person or mailed by registered or certified mail, postage prepaid, return receipt requested, addressed to the person and at the address designated in writing filed with MMWEC by the Participant. The Participant may change such designation, at any time and from time to time, by giving notice to MMWEC as below provided. Any such notice, demand or request to be delivered, given or made to MMWEC shall be deemed delivered, given or made if delivered in writing, in person, or sent by mail as above provided to the following address:

General Manager
Massachusetts Municipal Wholesale Electric Company
Stony Brook Energy Center
Westover Industrial Airpark
P.O. Box 426
Ludlow, Massachusetts 01056

or such other address designated as provided above.

17. *Relationship to Other Instruments.*

It is recognized by the parties hereto that MMWEC in the ownership, construction, acquisition and operation of the Project must comply with the requirements of any ownership agreements relating thereto, the Bond Resolution and all licenses, permits and regulatory approvals necessary for such ownership, construction, acquisition and operation, and it is therefore agreed that this Agreement is made subject to the terms and provisions of said ownership agreements, the Bond Resolution and all such licenses, permits and regulatory approvals.

18. *Arbitration.*

Any dispute under this Agreement shall be submitted to arbitration at the request of either MMWEC or the Participant. Copies of any such request shall be given to all other Participants and it shall specify the issue or issues in dispute. Within ten days after receipt of such

a request MMWEC and the Participant shall confer and attempt to agree upon appointment of a single arbitrator. If such agreement is not accomplished, MMWEC or the Participant may reqeust the American Arbitration Association to appoint an arbitrator. The arbitrator shall conduct a hearing in Ludlow, Massachusetts, and within thirty days thereafter, unless such time is extended by agreement of MMWEC and the Participant, shall notify the parties of his decision, stating his reasons for such decision and separately listing his findings of fact and conclusions of law. The arbitrator shall not have power to amend or add to this Agreement. Subject to such limitation, the decision of the arbitrator shall be final and binding on MMWEC and the Participant except that either party may petition a court of competent jurisdiction for review of errors of law. The pendency of arbitration shall affect neither the obligation of the Participant to make any payment in full when due under this Agreement nor the obligations of this Agreement upon the failure of the Participant to make any payment in full when due under this Agreement.

19. *Applicable Law.*

This Agreement is made under and shall be governed by the law of the Commonwealth of Massachusetts.

20. *Severability.*

If any section, paragraph, clause or provision of this Agreement shall be finally adjudicated by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall be unaffected by such adjudication and all of the remaining provisions of this Agreement shall remain in full force and effect as though such section, paragraph, clause or provision or any part thereof so adjudicated to be invalid had not been included herein.

21. *Assignment of Agreement.*

This Agreement shall inure to the benefit of, and shall be binding upon, the respective successors and assigns of the parties to this Agreement; *provided*, that neither this Agreement, nor any interest herein (including Project Capability), shall be assigned or transferred or sold by the Participant, except as provided herein, without the written consent of MMWEC, nor if in the opinion of counsel to MMWEC such assignment or transfer or sale would adversely affect the exemption from Federal Income Taxation of the interest on the Bonds. No such assignment or transfer or sale shall relieve the Participant of any obligation hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the 27th day of September, 1979.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

By /s/ Phillip L. Otness
Title: General Manager

Participant's Name

By

Title:

EXHIBIT A

PARTICIPANTS AND PARTICIPANTS' SHARES (1)

PROJECT NO. 6

Participant	Approximate Share of Project Capability (KW)	% Share of Project Capability
Town of Ashburnham	737	0.4238
Town of Boylston	833	0.4790
Town of Danvers	14,071	8.0909
Town of Georgetown	1,115	0.6411
Town of Groton	1,711	0.9838
Town of Hingham	5,658	3.2534
Town of Holden	5,000	2.8750
City of Holyoke	3,312	1.9044
Town of Hudson	26,000	14.9502
Town of Hull	1,992	1.1454
Town of Mansfield	9,548	5.4902
Town of Middleborough	2,541	1.4611
Town of Middleton	4,630	2.6623
Town of North Attleborough	3,056	1.7572
Town of Paxton	937	0.5388
City of Peabody	18,340	10.5456
Town of Reading	25,400	14.6052
Town of Shrewsbury	6,160	3.5420
Town of Sterling	1,100	0.6325
Town of Templeton	2,327	1.3380
Town of Wakefield	3,812	2.1919
Town of West Boylston	849	0.4882
Subtotal for MMWEC Members	139,129	80.0000
Village of Ludlow, Vermont (2)	1,382	0.7947
Village of Lyndonville, Vermont (2)	1,500	0.8625
Village of Morrisville, Vermont (2)	1,800	1.0350
Village Northfield, Vermont (2)	500	0.2875
Village of Stowe, Vermont (2)	3,500	2.0125
Village of Swanton, Vermont (2)	2,264	1.3018
Washington Electric Co-operative, Inc. (2) (3)	2,700	1.5525
Vermont Electric Cooperative, Inc. (2) (3)	10,000	5.7501
Pascoag Fire District, Rhode Island (4)	2,000	1.1500
Eastern Maine Electric Cooperative, Inc. (3)	5,000	2.8751
New Hampshire Electric Cooperative, Inc. (3)	4,136	2.3783
Subtotal for MMWEC Non-Members	34,782	20.0000
TOTAL	173,911	100.0000

(1) If (i) the Towns of North Attleborough and Reading, Massachusetts, the City of Holyoke, Massachusetts, and New Hampshire Electric Cooperative, Inc., or any of them, do not execute this Agreement by October 12, 1979, or if the respective vote or resolution authorizing such execution authorizes the purchase of a share of Project Capability less than the respective approximate share of Project Capability (KW) specified above, or (ii) this Agreement, as to any Participant, is subject to approval or disapproval by or lapse of a particular period of time after filing with the State of Vermont Public Service Board or the State of Rhode Island Public Utilities Commission, and such Board or Commission, as the case may be, has not approved or disapproved this Agreement, or the particular period of time has not elapsed, as the case may be, by December 21, 1979, or such later date as shall be agreed to by MMWEC (but not later than December 31, 1979), or (iii) any Participant is a party to an agreement or other instrument pursuant to which approval of this Agreement by the Administrator of the Rural Electrification Administration is required and such Administrator or his delegate has not approved this Agreement by November 1, 1979, or such later date as shall be agreed to by MMWEC (but not later than December 31, 1979), or (iv) the percentage ownership interest of MMWEC in Seabrook Units Nos. 1 and 2 is decreased pursuant to Exhibit B, then and in each such case each Participant's percentage share of Project Capability specified above shall be changed to equal the proportion which its approximate share of Project Capability (KW) specified above bears to the total of all remaining Participants' approximate share of Project Capability (KW) specified above; *provided, however,* that to the extent any such change results in the total percentage shares of Project Capability for MMWEC Members being equal to less than 80% of the total percentage shares of Project Capability for all Participants, then the percentage shares of Project Capability of all MMWEC Non-members shall be reduced pro-rata. Anything in this Agreement to the contrary notwithstanding, in the event of any such failure by the Administrator of the Rural Electrification Administration or his delegate, the State of Vermont Public Service Board, or the State of Rhode Island Public Utilities Commission to approve or disapprove this Agreement, or any such failure of a particular period of time to elapse after filing with such Board or Commission, as the case may be, the applicable Participant shall thereupon no longer be or be deemed to be or to have been a Participant for any and all purposes hereof. MMWEC shall notify the Participants promptly, in writing, of any change in the Participants or their shares of Project Capability pursuant to the foregoing provisions, and each such notification shall be a part of this Agreement.

[Continued]

[Continued]

(2) Approval or disapproval by or lapse of a particular period of time after filing with the State of Vermont Public Service Board is required.

(3) Approval of the Administrator of the Rural Electrification Administration is required.

(4) Approval or disapproval by or lapse of a particular period of time after filing with the State of Rhode Island Public Utilities Commission is required.

EXHIBIT B

PROJECT DESCRIPTION
PROJECT NO. 6

1. Project No. 6 is to consist of ownership interests of up to 7.56135% (or such lesser portion as MMWEC, prior to December 31, 1980, may notify the Participants is available) in each of the proposed nuclear generating units known as Seabrook Unit No. 1 and Seabrook Unit No. 2. Public Service Company of New Hampshire is constructing the Seabrook plant on a site in Seabrook, New Hampshire. Each of Seabrook Units Nos. 1 and 2 is a nuclear generating unit of approximately 1,150,000 KW net capability. Such units, each a Facility, are tentatively scheduled to commence commercial operation in April 1983 and February 1985, respectively.

2. The costs described in Section 1(f)(10) of this Agreement relate to study and development activity for implementing sources of renewable energy. Such activity's funding shall not exceed $5,000,000 derived from the proceeds of Bonds issued to finance the Costs of Acquisition and Construction of the Project to be utilized for preliminary survey, feasibility, investigation and development costs, engineering and licensing activities, acquisition of interests in land or property, related administrative and other costs, and such other purposes as may be voted by the Board of Directors of MMWEC, leading to a future MMWEC construction project. Renewable energy sources shall include, but not be limited to, hydroelectric development and refuse fueled generating processes. The selection of projects under this paragraph shall be under the direct control of the MMWEC Board of Directors.

EXHIBIT C

METERING AND DELIVERY POINT
PROJECT NO. 6

The Participant's Share of Project Capability will be metered and delivered at the low side of the station transformer at the unit site.

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 86-555

VERMONT DEPARTMENT OF PUBLIC SERVICE, VILLAGE OF STOWE; and VERMONT ELECTRIC COOPERATIVE, INC.,
Plaintiffs-Appellants,

v.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; and VILLAGE OF NORTHFIELD,
Defendants-Appellees.

MEMORANDUM IN SUPPORT OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY'S MOTION FOR REARGUMENT

Massachusetts Municipal Wholesale Electric Company ("MMWEC") moves pursuant to V.R.A.P. 40 for reargument of the Court's decision entered September 27, 1988. The Court overlooked or misapprehended a number of points of law which, if properly considered, would require a reversal of the Court's decision. The most glaring, although by no means the only, oversight in the Court's decision is its inexplicable failure to uphold Lyndonville's PSA even after citing the statute that explicitly authorizes Lyndonville to enter into take-or-pay contracts. As discussed in detail below, the authority of Lyndonville is one of a number of issues raised by the Court's decision that must be addressed on reargument.

* * * *

E. *The Court's Decision Violates The Commerce Clause, The Takings Clause And The Due Process Clause of the United States Constitution.*

If permitted to stand, the Court's sudden and unpredictable change in state law invalidating the PSAs between all Vermont participants and MMWEC will result in violations of the Commerce Clause, Takings Clause and the Due Process Clause of the United States Constitution. U.S. Const. Art. I, § 8; amend. V. cl. 4 and amend. XIV, § 1, cl. 3.[1]

Under the commerce clause "states are barred from regulating interstate commerce in a manner which significantly interferes with the national economy." *Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 843 (1st Cir. 1988) and cases cited. Using the commerce clause the United States Supreme Court has "consistently rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce . . . ." *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 535 (1949).

In the instant case, the decision of the Court dramatically interferes with the movement of a critical article of interstate commerce in modern society—electricity. It effectively prohibits Vermont participants from entering into any future wholesale power contracts with out-of-state participants. It also provides a basis for Vermont municipalities and cooperates to invalidate pre-existing energy contracts with out of state utilities, which the Vermont participants now find uneconomical or otherwise undesirable. The effect of the Court's ruling is to create a special set of limitations on interstate power agreements which apply only to Vermont utilities. Such a re-

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[1] MMWEC pleaded by affirmative defense various federal constitutional defenses to plaintiffs' claims in this case. In light of this Court's decision on state law issues, at a minimum MMWEC is entitled to have the case remanded to the Superior Court for consideration of the constitutional issues.

sult impermissibly delays and inconveniences interstate Commerce. *See, e.g., Kassel* v. *Consolidated Freightways Corp.* 450 U.S. 662 (1981).

The Takings Clause is made applicable to the states through the Due Process Clause. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 122 (1977). A key consideration in determining whether a state has impermissibly "taken" property is "[t]he economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . ." *Id.* at 124.

Here MMWEC issued hundreds of millions of dollars in bonds and invested this money in the Seabrook project based on written promises by municipal and cooperative utilities that they had an unconditional obligation to make monthly payments to MMWEC. The Court's decision, by making a sudden change in Vermont law that was unpredictable in terms of the relevant precedents, ignored MMWEC's reasonable reliance on the PSAs, thus resulting in the frustration of reasonable "investment-backed expectations" which cannot be taken without compensation. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979).

Respectfully submitted,

/s/ Jeffrey F. Jones

/s/ William Lahey
DANIEL O. MAHONEY
JEFFREY F. JONES
WILLIAM L. LAHEY
PALMER & DODGE
One Beacon Street
Boston, MA 02108
(617) 573-0100

/s/ John Parker
JOHN PARKER
PARKER, LAMB & ANKUDA, P.C.
P.O. Box 519
Springfield, Vermont

Dated: October 10, 1988

